The State Bar of California

Client Trust Accounts and Bank Stability Concerns

FAQs

1) **Q: How does FDIC insurance protect client trust funds?**

A: Selecting a bank that is regulated by a federal or state agency and that carries deposit insurance from an agency of the federal government is an important consideration. As a client's fiduciary, a lawyer is responsible for protecting client funds.

Operative until December 31, 2009, client funds deposited in IOLTA accounts at participating financial institutions are eligible for unlimited deposit insurance coverage as part of the Temporary Liquidity Guarantee Program (TLGP). All funds in a properly designated IOLTA account, regardless of size, may now be insured in full by the FDIC, as part of the Temporary Account Guarantee (TAG) provisions of the TLGP. Financial institutions opting out of the TAG coverage must display a notification to customers. Full text of the final rule can be found at the FDIC website.

By treating IOLTA accounts as "non-interest bearing accounts," the FDIC has enabled financial institutions to opt in to a program to provide unlimited deposit insurance coverage for IOLTA accounts, effectively removing the former temporary insurance coverage cap of $250,000. For further information, including FAQs about how FDIC insurance would apply in the event of bank failure, refer to the FDIC website. The FDIC will also be posting a list of financial institutions that have opted out of the TPLG by the December 5th deadline.

While the presence of FDIC insurance is important, a lawyer should note that even if all of a client's funds are covered, by the time the FDIC pays a client their money, that client's interests might be adversely impacted.

For example, the delay may result in a missed business opportunity. Similarly, FDIC coverage will not help with the problem that could arise if a bank goes under and copies of a client's trust bank account records need to be retrieved from that bank.

2) **Q: Isn't FDIC insurance an express requirement for IOLTA deposits?**
A: Effective January 1, 2008, Business and Professions Code Section 6213 was amended to define an IOLTA account as an account or investment product that is:

1) an interest-bearing checking account;

2) an investment sweep product that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund; or,

3) any other investment product authorized by the California Supreme Court.

Consistent with that legislation, the California Supreme Court rescinded its 1982 order that previously required IOLTA accounts be held in an institution that has its deposits insured by the federal government.

The legislation provides for strictly defined conservative safe investment sweep products, which are sometimes held on the investment side of the bank and therefore are not necessarily covered by the FDIC.

The Court's new order is silent on federal insurance for deposits, but the State Bar is working on regulatory requirements with respect to financial institutions either through rule or revised legislation. Monitor the IOLTA pages on the State Bar's Web site for ongoing developments.

3) Q: Given the limits on FDIC insurance, should I attempt to divide-up deposits among several banks?

A: See answer to Question #1. The FDIC has extended FULL insurance coverage to all IOLTA accounts, regardless of amount on deposit or number of clients, at all financial institutions that participate in the FDIC's Transaction Account Guarantee Program.

However, if client funds are placed in an account other than an IOLTA account, for example in an interest bearing account or other dividend-paying trust investment established pursuant to Business and Professions Code Section 6211(b) where the interest or dividends inure to the benefit of the client, then issues of FDIC insurance coverage and coverage limits should be considered.

The State Bar's Ethics Hotline is not aware of any authority in California mandating the approach of dividing-up client deposits as an absolute disciplinary standard. Prudence and good client communication should be exercised in electing to take this approach.

Rule 3-500 of the Rules of Professional Conduct requires a lawyer to keep a client reasonably informed about "significant developments" and the approach of dividing deposits may be something to consider with a particular client given that client's specific situation.

However, depending on the number of banks and clients involved, this approach could lead to accounting and record-keeping challenges.

Bear in mind that the goal is to maintain client funds in a financially stable institution and that FDIC insurance for a deposit is one factor to consider but it is not determinative. (See the above discussion of investment sweep products for IOLTA deposits.)

The FDIC has a webpage with links to several private bank rating services; however, the list is not to be construed as an endorsement or confirmation of the information provided by any of the listed companies.

In addition, you should realize that civil liability is a separate concern from State Bar disciplinary or regulatory standards. You may want to contact your professional liability insurance carrier for guidance on the pros and cons of attempting to divide-up trust fund deposits.